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A

Public Prosecutor v Manimaran a/l Amas & Ors

B HIGH COURT (IPOH) — CRIMINAL TRIAL NO M6–45–30 OF 2009
TEO SAY ENG JC
5 SEPTEMBER 2013

C *Criminal Procedure — Defence — Alibi — Accused persons charged for murder — Accused persons denied having knowledge of murder and robbery — Common defence of alibi — Whether defences substantiated with evidence — Whether created reasonable doubt in prosecution's case — Whether defences were afterthoughts — Penal Code s 302*

D The three accused persons in this case were charged for murder, an offence under s 302 of the Penal Code. Briefly, the facts were the deceased's wife ('SP8') was awakened by the noise of curtain being pulled. When she went to the hall, the deceased was seen surrounded by six Indian men with parangs. There was
E a pool of blood on the floor near where the deceased was sitting. Two of the six men tied her and took the jewelleries which she was wearing. Before the men left, one of the men told her that her husband would die soon. After untying herself, SP8 ran to the neighbour's house to seek help. 20 minutes later, the ambulance and the police arrived but the deceased had passed away. The post
F mortem revealed that the deceased died due to excessive bleeding caused by slash wounds. Apart from the jewelleries, other items stolen were one money box, a DVD player, a few sarees and a Proton Waja. After an investigation by the police, the accused persons were arrested and this led to the discovery of the stolen items. Having found that the prosecution had failed to establish a prima
G facie case for the murder charge against all the accused person, the trial court acquitted and discharged them all without calling upon them to enter defence. Dissatisfied, the prosecution appeal and the appellants were ordered to enter defence. The first accused submitted that he was at his friend's house when he was arrested by the police and he said he did not know why he was arrested. The
H second accused, when questioned about the whereabouts of the Proton Waja, denied purchasing the said car. The third accused, on the other hand, submitted that he was sleeping at his mother-in-law's house on the day of the incident and was not at the house where the deceased died.

I **Held**, convicting and sentencing accused persons to death:

(1) The defence put forward by the accused persons have failed to create any reasonable doubt in the prosecution case and the prosecution had

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succeeded in proving its case as per charge against all the three accused persons beyond reasonable doubt at the end of the defence case (see para 129).

(2) The common defence put forward by all the three accused persons was that they were not present at the scene of crime on the day and time in question. They said they were elsewhere. Such a defence could not be considered as an alibi defence under s 402A of the Criminal Procedure Code as they failed to give a ten days' notice as required by the relevant provision. Furthermore, the alleged defence was just a bare denial which was not supported by any evidence in court (see paras 119–121).

(3) Having considered the bare denials vis-a-vis the evidence adduced in totality for this case, it failed to create any reasonable doubt in the prosecution's case. New facts or evidence were even introduced but the new defences were afterthoughts as they were never put or suggested to the prosecution witnesses at the prosecution stage. They were sprung up for the first time during the defence stage and they were bare assertions without being substantiated with evidence and have failed to create any reasonable doubt in the prosecution case (see paras 121, 123 & 125).

[Bahasa Malaysia summary

Ketiga-tiga tertuduh dalam kes ini dituduh membunuh, kesalahan di bawah s 302 Kanun Keseksaan. Secara ringkas, fakta adalah bahawa isteri si mati dikejutkan bangun oleh bunyi langsir tingkap ditarik. Apabila dia pergi ke ruang tamu, si mati telah dikelilingi oleh enam orang India memegang parang. Terdapat lumuran darah di atas lantai berhampiran di mana si mati duduk. Dua daripada enam lelaki tersebut mengikatnya dan mengambil barang kemas yang dipakainya. Sebelum lelaki-lelaki tersebut meninggalkan tempat kejadian, salah seorang daripada lelaki tersebut memberitahu dia yang suaminya akan mati tidak lama lagi. Selepas membuka ikatan dirinya, SP8 berlari ke rumah jiran untuk mendapatkan bantuan. 20 minit kemudian, ambulans dan polis tiba tetapi si mati telah meninggal dunia. Post mortem menunjukkan bahawa si mati meninggal dunia akibat pendarahan yang berlebihan disebabkan oleh luka ditikam. Selain daripada barang kemas, barang lain yang dicuri adalah kotak wang, pemain DVD, beberapa kain sari dan kereta Proton Waja. Selepas siasatan oleh polis, tertuduh-tertuduh ditangkap dan ini membawa kepada penemuan barang-barang yang dicuri. Setelah mendapati pihak pendakwaan gagal untuk membuktikan kes prima facie untuk tuduhan membunuh terhadap kesemua tertuduh, mahkamah perbicaraan melepaskan dan membebaskan mereka semua tanpa memanggil untuk memasukkan pembelaan. Tidak puas hati, pihak pendakwaan merayu dan perayu-perayu diarahkan untuk memasukkan pembelaan. Tertuduh pertama berhujah bahawa ia berada di rumah kawannya apabila dia ditangkap oleh polis dan dia menyatakan dia tidak tahu mengapa dia ditangkap. Teruduh kedua, apabila disoal mengenai di mana Proton Waja tersebut berada,

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menafikan membeli kereta tersebut. Tertuduh ketiga, sebaliknya, berhujah bahawa dia tidur di rumah ibu mertuanya pada hari kejadian dan tidak berada di rumah tersebut di mana si mati meninggal dunia.

Diputuskan, mensabitkan dan menghukum tertuduh-tertuduh dengan hukuman mati:

(1) Pembelaan yang dikemukakan oleh tertuduh-tertuduh telah gagal untuk membentuk apa-apa keraguan munasabah di dalam kes pihak pendakwaan dan pihak pendakwaan telah berjaya dalam membuktikan kesnya seperti dituduh terhadap kesemua ketiga-tiga tertuduh melampaui keraguan munasabah pada akhir kes pembelaan (lihat perenggan 129).

(2) Pembelaan biasa yang dikemukakan oleh ketiga-tiga tertuduh adalah bahawa mereka tidak berada di tempat kejadian pada hari dan masa yang dipersoalkan. Mereka menyatakan mereka berada di tempat lain. Pembelaan sedemikian tidak boleh dipertimbangkan sebagai pembelaan alibi di bawah s 402A Kanun Tatacara Jenayah kerana mereka gagal memberi notis sepuluh hari seperti yang dikehendaki oleh peruntukan relevan. Selanjutnya, pembelaan yang didakwa adalah semata-mata penafian sahaja yang tidak disokong oleh apa-apa keterangan di mahkamah (lihat perenggan 119–121).

(3) Setelah mempertimbangkan penafian semata-mata vis-a-vis keterangan yang dikemukakan secara keseluruhannya untuk kes ini, ia gagal untuk membentuk apa-apa keraguan munasabah di dalam kes pihak pendakwaan. Fakta baru atau keterangan juga dimasukkan tetapi pembelaan baru adalah sesuatu yang difikirkan kemudian kerana ia tidak pernah dikemukakan atau dicadangkan kepada saksi-saksi pihak pendakwaan di peringkat pihak pendakwaan. Ia dibangkitkan untuk pertama kalinya semasa peringkat pembelaan dan ia adalah penegasan kosong tanpa disokong dengan keterangan dan telah gagal untuk membentuk apa-apa keraguan munasabah di dalam kes pihak pendakwaan (lihat perenggan 121, 123 & 125).]

Notes

For cases on alibi, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1944–1976.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 AMR 323, FC (refd)
Chong Soon Koy v Public Prosecutor [1977] 2 MLJ 78, FC (refd)
Hasamuddin bin Talena v Public Prosecutor [2002] 2 MLJ 408; [2002] 2 CLJ 504, CA (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306, FC (refd)

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Kathavarayan a/l Munisamy v Public Prosecutor [2009] 1 MLJ 837; [2009] 1 CLJ 125 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (folld)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401, HC (refd)
Pulukuri Kottaya & Ors v Emperor AIR 1947 PC 67, PC (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (folld)
Yee Ya Mang v PP [1972] 1 MLJ 120 (refd)

Legislation referred to

Criminal Procedure Code ss 180(1), 402A
Evidence Act 1950 ss 8, 27, 45
Penal Code s 34

Siti Fatimah bt Talib (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
V Stanislaus (MS Vethanayagam) for the first accused person.
RV Lingam (RV Limgam & Co) for the second accused person.
Mahinderjit Singh (Mahinderjit, Meor & Assoc) for the third accused person.

Teo Say Eng JC:

[1] The three accused were charged as follows:

> Bahawa kamu pada 11 Januari 2009, di antara jam lebih kurang 11.30 malam sehingga 12 Januari 2009 jam 2.10 pagi, di Rumah No 759, Jalan Wayang, Buntong, Ipoh, dalam Daerah Kinta, dalam Negeri Perak Darul Ridzuan, telah melakukan pembunuhan iaitu menyebabkan kematian ke atas Sindambaram a/l Nadason No K/P: 450428-08-5083 dan dengan itu kamu telah melakukan suatu kesalahan yang boleh di hukum di bawah seksyen 302 Kanun Keseksaan di baca bersama Seksyen 34 kanun yang sama.

[2] The prosecution had subpoenaed 29 witnesses in this case. At the end of the prosecution case, I find that the prosecution had failed to establish a prima facie case against all the three accused persons. I therefore acquit and discharge all the three accused persons without calling upon them to enter their defence. I now give the reasons for my decision.

PROSECUTION CASE

House was broken in and the deceased was slashed

[3] Letchmy a/p Thangavelu ('SP8') was the wife of the deceased Sindambaram a/l Nadason. She was married to the deceased and had three children. On 11 January 2009 at about 10.30pm, when she went to bed, her deceased husband was watching television. She was awaken by the noise of

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curtain being pulled. When she went to the hall, she saw her husband seated at a coffee table surrounded by six Indian men armed with parangs in the hall and there was pool of blood on the floor near where her deceased husband was seated. All the men were wearing masks which covered the whole head except the eyes. One was fat and the other was thin. She pleaded with them to let her deceased husband go.

[4] Two of the six men pulled her to the second room and tied her and took her necklace, two bangles, one bracelet and one ring. They ransacked all the cabinets in the second room and took a money box, cash of RM1,500 and six pairs of gold ear rings from the fifth room.

[5] Before they left the two Indian men came to her room and showed her some car keys and remote control for the gate. They asked her which key was for the car and which key was for the gate. One of them told her that her husband would die soon. After the men left, her husband then came into her room and told her that he could not untie her and said he felt giddy and fainted and fell to the fioor. SP8 tried to untie herself and succeeded in doing so.

[6] She went to make a phone call but found that the phone was disconnected. She then used the switch in the house to open the auto gate and went to the front neighbour's house to ask for help and the neighbours phoned the ambulance. About 20 minutes later ambulans and the police arrived. She then waited in the neighbour's house until 5–6am on 12 January 2009. At about 6.30am her son told her that the deceased father had passed away.

[7] SP8 said, apart from her jewerlleries and one money box, a DVD player and a few sarees were also missing from the house. She also told the court that the car Proton Waja which was used by her deceased husband also went missing. She could identify one DVD player by the LG brand which was black and silver in colour ('P17') which was shown to her. When shown with a *parang* (i/d 20A) which was recovered from the porch of the deceased's house she told the court that the *parang* used by the six masked Indian men were more or less the same as the one shown to her in court. In cross-examination she agreed with learned defence counsel that the DVD player P17 silver and blck in colour could be bought in any shop.

Cause of death

[8] Dr Mohammad Shafie bin Othman @ Osman ('SP9') a forensic expert attached to the Forensic Pathologist Department General Hospital Ipoh who conducted a post mortem on the deceased Sindambaram a/l Nadason on 12 January 2009 at about 8.25am.

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[9] The deceased was identified to him by ASP Hafizul Helmi the investigating officer of this case ('SP29') and the Siva Shankar a/l Sindambaram, the deceased's son.

[10] The post mortem revealed that the deceased had sustained slash wounds (*luka-luka tetakan*) at the back of the head, body and both his arms (*lengan*). The slash wounds (*luka-luka tetakan*) had caused excessive bleeding which had resulted in his death.

[11] The cause of death was due to excessive bleeding due to the slash wounds. SP9 was of the view that the slash wounds were sufficient in the ordinary cause of nature to cause death. The time of death was estimated to have taken place between 11.30am on 11 January 2009 and 3.30am on 12 January 2009.

Discovery of finger print

[12] ASP Chek U Koi ('SP14') the head of Forensic Unit at IPK Perak had led a forensic team consisting of D Sjn Tan Swee Seng, D Sjn Patrick Leong, D Kpl Jasmin Yusof and D Kpl Ahmad Kamal Hasni to house No 759, Jalan Wayang, Buntong to look for evidence which would assist in the investigation of the murder case in respect of Kg Bharu Repot 88/09. The team managed to trace and lift among other things 17 finger prints from various parts of the house. SP14 then marked the 17 lifting cards which contained the said finger prints as C1–C17. He then handed the said 17 lifting cards marked C1–C17 exh P12 (1–17) together with *Borang USTK Penimbulan Mengesan Cap Jari dan keterangan fizikal* to ASP Hafizul to be handed to finger print expert for examination and comparison.

[13] SP6 Ngasman bin Hj Saring, Penolong Pendaftar Penjenayah attached to Pusat Pendaftaran Penjenayah confirmed that he had received 17 lifting cards marked C1-C17 exh P12 (1–17) from ASP Hafizul for examination and comparison. After examing all the finger prints from the 17 lifting cards, he confirmed that the finger print of lifting card C12 (P12 (12)) was similar to the right thumb print of Manimaran a/l Amas, *Kad Pengenalan No* 890306–14–5139 in form RJ2C which was a record from National Registration Department.

The arrest of accused Nos 1, 2 and 3

[14] ASP Zairuinizam bin Mohd Zainuddin @ Hilmi ('SP17') was the police officer who arrested the first, second and third accused.

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[15] On 16 January 2009 around 12 midnight SP17 was instructed by the acting OCCI ACP Zulfikfli to lead a police party to conduct a raid on a house in Kepong. Around 2.30am, the police party led by SP17 reached Kepong Ulu and arrested a male Indian by the name of Pon Kogulan in a house. Pon Kogulan then led SP17 and his police party to Bukit Sentosa. They reached the place around 4.30am where SP17 and his police party managed to arrest four male Indian in a house and one of them arrested was Manimaran a/l Amas ('the first accused'). All the four male Indian including the first accused were brought back to Balai Polis Bukit Sentosa Bukit Beruntung Rawang, where a police report was lodged, that is, Bukit Sentosa Report 301/09. On the same day at about 3pm SP17 and his men arrested another male Indian by the name of Saravanan a/l Segaran ('the second accused') infront of the Petronas Petrol Station in Batu Cave. SP17 had seized a Kancil driven by the second accused and a handphone from the second accused and a police report was lodged, that is, Selayang Report 1072/09.

[16] On 17 January 2009 at about 2.30am SP17 arrested another male Indian by the name of Perumal (the third accused) in front of a 7 Eleven shop in Teluk Panglima Garang Sp17 had seized a motorcycle and a handphone from the third accused. The third accused was brought back to Balai Polis Panglima Garang where a police report was lodged, that is, Teluk Panglima Garang Report 199/09.

The recovery of Proton Waja

[17] SP17 told the court that after arresting the second accused in front of the Peteronas Petrol Station in Batu Caves, while on the journey back to IPD Gombak, SP17 interrogated the second accused in the police car. The second accused had given certain information regarding a car which he drove from Ipoh on the day of the incident. SP17 then recorded the information on a piece of paper in the police car and was tendered and marked as ID49. With the information supplied by the second accused a burnt Proton Waja was found by the side of a main road, that is, Jalan Besar Banting Teluk Panglima Garang. The Proton Waja was brought back to Balai Teluk Panglima Garang on the same day. The car was subsequently seized by SP17. When SP17 subsequently checked the chasis number at the police station, he confirmed that the chasis number of the Proton Waja was PL1CF1SRR 6 F 260839. Encik Sallehuddin bin Saman a senior assistant enforcement officer ('SP10') testified that a Proton Waja with the registration No AFR 2356 was registered in the name of Renuga Devi a/p Sindambaram ('SP7') and its chasis number was PL1CF1SRR6F260839. SP7 confirmed that the car which was missing from her deceased father's house on the day of incident was one Proton Waja AFR 2356 which was bought by her in February 2006 and was registered in her name.

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The recovery of the parang and the DVD player

[18] After the arrest of the third accused, he was interrogated by SP17 and D Kpl Gunalan. The third accused gave certain information which was recorded in his note book. The page of his note book which contained the information was marked as ID50. The third accused then led SP17 and his men to a house where four *parang*, a DVD player, a chocolate T-shirt and a pair of blue jeans (trousers) were recovered.

The recovery of the No Plate AFR 2356

[19] SP26 ASP Somu a/l Subramaniam told the court that he and his men had interrogated the third accused on 25 January 2009 at about 11.40am in his office at IPK Perak. The third accused told him that 'saya boleh tunjuk tempat saya buang nombor plet'. The third accused then led SP17 and his police team to the side of a main road, that is, Jalan Bagan Kebun Baru, Batu 9, Teluk Panglima Garang. While at the side of the main road, the third accused pointed to SP26 an area by the side of a road which had a small drain alongside the road which was surrounded by the oil palm plantation. After 45 minutes of search, SP26 and his police party found 12 broken pieces of a car registration No Plate AFR 2356.

The identification of the DVD player

[20] The DVD player which was marked exh P17 was shown to the deceased's wife SP8 who could identify the DVD player by its brand ie LG brand and its colour which was black and silver. Similarly the DVD player was also identified by the deceased's daughter SP7 who told the court that the DVD player was bought by her deceased father and was placed in the living room of her deceased father's house.

[21] She said she could identify the DVD player by its brand and its colour ie black and silver. She also told the court that she had kept the receipt of the purchase of DVD player. An invoice of the purchase of the DVD player ('exh P18') and a warranty card of the DVD player ('exh P19') were shown and identified by SP7. The warranty card ('exh P19') bore the serial number of the DVD Player as 6111NKH201645 which tallied with the serial number of the DVD player ('P17').

[22] SP12 Wong Tuck Hor confirmed that the DVD player LG brand (P17) was the one sold from his shop. The invoice P18 was the one issued by his shop in the name of the deceased Sindambaran. The warranty card P19 for the DVD player was also issued by his shop. He confirmed that the DVD player was

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purchased from his shop on 28 February 2007 and the serial number stated in P17 was the same as that stated in the warranty card P19.

DMA profiling

[23] The investigating officer SP29 had sent 22 exhibits to the chemist SP19 for DNA profiling. SP19 confirmed that the DNA profile developed from the bloodstain on *parang* marked HH2 ('P23A') matched with the DNA profile of the blood specimen of the deceased. The *parang* P23A was recovered by ASP Chek U Choi and his men from the deceased's house.

The law

[24] The prosecution is required to prove the ingredients of murder against all the three accused beyond reasonable doubt, namely:

(a) death of Sindambaram a/l Nadason;

(b) it was caused by the acts of the accused;

(c) the acts by which the death was caused were done:

(i) with intention of causing death; or

(ii) with the intention of causing such bodily injury as the accused knew to be likely to cause the death of Sindambaram a/l Nadason to whon the harm was caused; or

(iii) with the intention of causing bodily injury to Sindambaram a/l Nadason; and the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death; or

(iv) or with the knowledge that the act was so imminently dangerous that it must in all probability cause death, on such bodily injury is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

(d) it is also incumbent upon the prosecution to prove that the act was done by several persons, in furtherance of the common intention of all each of such persons is liable for that act in the same manner as if the act were done by him alone – s 34 of the PC.

The burden of proof of the prosecution at the close of the prosecution case

[25] Section 180(1) of the CPC provides:

> When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused.

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[26] What then constitutes a prima facie case? The Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 AMR 323 described 'a prima facie case' in the following terms:

> A prima facie case is one that is sufficient for the accused to answer, and the evidence adduced must be such that it can only be surmounted by the evidence in rebuttal. The force of that evidence must, if unrebutted, be sufficient to induce a state of belief that the facts as they stand are as stated in the charge. In order to make a finding the court must, at the close of the prosecution's case, undertake a positive evaluation of the credibility and reliability of all the evidence adduced to determine whether all the elements of the offence have been established. If the evidence is unrebutted, and the accused remains silent, he must be convicted. Therefore, the test to be applied at the end of the prosecution's case is whether there is sufficient evidence to convict the accused if he chooses to remain in silent, which if answered in the affirmative means that a prima facie case has been made out. This requires a consideration of the existence of any reasonable doubt in the prosecution's case, which if it exists, cannot lead to the finding of a prima facie case having been made out.

[27] It is clear that the court must subject the prosecution evidence to maximum evaluation to determine whether all the essential ingredients have been proven.

[28] The maximum evaluation requires the court to test, scrutinise and evaluate the prosecution evidence thoroughly from all angles. It is a test of credibility and reliability of the prosecution evidence.

Evaluation of evidence

The death of Sindambaram a/l Nadason

[29] The prosecution had proved that Sindambaram a/l Nadason (the deceased) died with slash wounds as per the post mortem report exh P21 prepared by Dr Mohammed Shafie bin Othman SP9. The first ingredient of the offence had therefore been proved.

Whether the death of Sindambaram a/l Nadason was caused by the acts of the accused persons

[30] The prosecution was trying to adduce some direct evidence through four material witnesses namely SP24, SP25, SP27 and SP28 to link the three accuseds to this crime of murder. But it faited to do so because all the four witnesses refused to cooperate. As a result nothing incriminating had been adduced through them. Neither did the prosecution suggest any impeachment proceeding against them. Therefore at close of the prosecution case no direct evidence had been adduced to prove that the three accused persons were among

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A the six male Indians who had broken into the deceased's house between 11 January 2009 around 11.30pm and 12 January 2009 around 2.10am and slashed the deceased.

B **[31]** The prosecution was therefore left with some so called circumstantial evidence to prove this ingredient of the offence.

C **[32]** It is trite law that where the prosecution is relying on circumstantial evidence, the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient: *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561.

D **[33]** In other words, the test for circumstantial evidence is this: whether the effect of all this evidence drives you inevitably and inexorably to the one conclusion only, that is, it was the accused who intentionally caused the death of the deceased (see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195). In fact the irresistable conclusion test was synonymous with the standard of proof beyond reasonable doubt as was held in *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306.

E **[34]** The prosecution in fact relied upon the following circumstantial evidence to link the first, second and the third accused with the crime of murder:

F The fingerprint of the first accused found at the scene of crime

[35] The prosecution sought to rely on the presence of the first accused's fingerprint on the grille at the back of the deceased's house to link him with the crime of murder. It had been proven that 17 fingerprints had been found and
G successfully lifted at the scene of crime, that is, the deceased's house by the forensic unit from IPK Perak led by ASP Chek U Choi SP14 and were sent to the fingerprint expert ('SP6') for examination and comparison.

[36] One of the fingerprints found at the grille at the back of the deceased's
H house was confirmed by the fingerprint expert SP6 to be the right thumb print of the first accused (see exh P12 (12)).

[37] Learned counsel for the first accused had vehemently challenged the expertise of SP6 and submitted that the evidence of SP6 should be rejected on
I the following grounds:

(a) he had only *Sijil Tinggi Bersekolah* ('STPM') qualification;

(b) although he had attended various courses three years ago regarding finger prints in Pusat Pendaftaran Penjenayah Bukit Aman, Kuala

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Lumpur, the said courses were conducted in Malaysia. Moreover, he did not produce any certificates on the courses he had attended;

(c) he is not a member of the professional body currently; and

(d) he is only a *timbalan pendaftar penjenayah* which is only an administrative position.

[38] The question whether he is an expert is for the court to decide based on his qualification, his training plus the courses he had attended and his working experience.

[39] For convenience and easy reference, I shall produce here the extract of his evidence with regard to his qualification, training and experience:

> Saya memiliki Sijil Tinggi Persekolahan. Saya telah menghadiri kursus asas cap jari, kursus lanjutan cap jari dan kursus-kursus berkaitan dengan cap jari yang diadakan dari masa ke semasa. Kursus yang terkini yang saya hadir ialah 3 tahun yang lepas iaitu kursus berkaitan dengan cap jari di Pusat Pendaftaran Penjenayah Bukit Aman Kuala Lumpur. Saya hanya menghadiri kursus cap jari hanya di dalam negara sahaja. Saya tidak menjadi ahli badan professional berkaitan tugas sekarang. Saya ada beri latihan dan taklimat berkaitan dengan cap jari di Pusat Pendaftaran Penjenayah, di Pusat latihan Perlis Kuala Kubu Bharu, di Pusat Latihan Polis Jalan Semarak Kuala Lumpur, di Pusat Latihan Polis Cheras di ILKAP Bangi, di Pusat Latihan Imigresen di Port Dickson, di Pusat Latihan KWSP Bangi, di Pusat Latihan Tabung Haji, di Pusat Latihan JPN juga di Pusat Latihan Tentera.
>
> Diantaranya permohonan untuk pemeriksaan dan perbandingan cap jari dibuat oleh, diantaranya pihak Polis, Imigresen, tentera, KWSP, JPN, dan juga daripada pihak peguam.

[40] Having carefully considered the evidence adduced as to his qualification, the training through the courses he had attended pertaining to the fingerprints and his working experience I was satisfied that:

(a) the area on which he was testifying falls under the matters mentioned in s 45 of the Evidence Act 1950, that is, fingerprint impressions; and

(b) SP6 was indeed an expert, that is, a person specially skilled in the matters which he was testifying on. His opinion based on the facts adduced in court could be accepted.

[41] With the admission of this piece of evidence, the prosecution had at least proven that the presence of the first accused at the scene of the crime. But the prosecution was yet to prove that the first accused was present on the date and time as alleged in the charge. Even if the prosecution could prove that the first accused was present at the scene of crime on the date and time alleged in the charge, that evidence alone without more, is insufficient to prove that he

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was one of the six Indian men who had slashed the deceased let alone to form the basis of a finding of guilt on a charge of murder against him.

The Proton Waja AFR 2356 was found by the police by the roadside of Jalan Besar Banting Teluk Panglima Garang

[42] The prosecution had first established through. SP7 and SP8 that a Proton Waja AFR 2356 registered in the name of Renuga a/p Sindambaram together with some jewelleries, 20 sarees and a DVD player had been reported stolen from the house at 759 Jalan Wayang Buntung Ipoh (see exh P16).

[43] The prosecution had also proven that the burnt Proton Waja found by the road side of Jalan Besar Banting Teluk Panglima Garang belonged to SP7, deceased's daughter by showing the chassis number found on the burnt Proton Waja, that is, PL1CF1SRR6F260839 which tallied with the chasis number of the Proton Waja AFR 2356 which was registered in the name of Renuga a/p Sindambaram, SP7 through the evidence of SP10 (a JPJ officer) and SP17, (the arresting officer) and the exhs tendered and marked as P8 (9 & 10) the two photographs showing the chassis number of the burnt Proton Waja, P30A, *Senarai Butir-butir dan Kenderaan* AFR 2356.

[44] Since the Proton Waja was the only incriminating evidence which could link the second accused to this crime of murder, the prosecution claimed that it was discovered in consequence of the information given by the second accused after his arrest.

[45] The prosecution sought to admit during the trial, the information, that is, 'saya boleh tunjukkan tempat bakar itu kereta di Banting' contained in a document marked as ID49 under s 27 of the Evidence Act 1950.

[46] This was strongly objected to by learned counsel for the second accused. The prosecution relied on the evidence adduced through the arresting officer SP17 together with D Kpl Gunalan.

[47] According to SP17, after arresting the second accused on 16 January 2009 at about 3pm in front of the Petronas Petrol Station in Batu Caves and while on the way to IPD Gombak in the police car, the second accused told SP17 that he wanted to give certain information pertaining to the Proton Waja in connection with Kg Rapat Repot 88/09 (SP17 later corrected himself during the cross-examination that is was Kg Bharu Repot 88/09 and not Kg Rapat Repot 88/09. He then administered the caution to him in Bahasa Melayu and was interpreted by D Kpl Gunalan who was with him in Tamil. SP17 then proceeded to record the information on a piece of paper. The content of the information was read back to the second accused by SP17 in Bahasa Melayu

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and by D Kpl Gunalan in Tamil. Both SP17 and the second accused signed at the end of the information recorded. SP17 told the court that the information was recorded by him in the car while the car was moving. The second accused was then handcuffed from the back.

[48] SP17 told the court that after receiving the information he instructed D Sjn Nordin and L Kpl Ismail to go to the place given by the second accused to look for the burnt Proton Waja. Half an hour later, SP17 was told that a vehicle frame believed to be the burnt Proton Waja was found beside Jalan Besar Banting, Teluk Panglima Garang.

[49] SP17 again told the court that on the way to arrest the third accused, the car in which he and the second accused were travelling passed the place where the Waja frame was found and he saw the said vehicle frame but did not stop. He said on 17 January 2009 at about 8.30am he went back to the place where the Waja frame was found but the Waja frame was no longer there and had been brought back to Balai Teluk Panglima Garang.

[50] Based on the evidence adduced, the prosecution sought to adduce the information, that is, 'saya boleh tunjukkan tempat bakar itu kereta di Banting.'

[51] The prosecution submitted that the requirements of s 27 of the Evidence Act 1950 had been complied with, namely:

(a) the said information was given by the second accused while in custody;

(b) the information was given before the discovery of the Waja frame; and

(c) the information supplied had led the police to the discovery of the Waja frame.

[52] The prosecution cited the following cases in support of the contention:

(a) *Pulukuri Kottaya v KE* AIR 1947 PC 67;

(b) *Kathavarayan a/l Munisamy v Public Prosecutor* [2009] 1 MLJ 837; [2009] 1 CLJ 125;

(c) *Chong Soon Koy v Public Prosecutor* [1977] 2 MLJ 78 (FC); and

(d) *Hasamuddin bin Talena v Public Prosecutor* [2002] 2 MLJ 408; [2002] 2 CLJ 504 (CA).

[53] On the issue of voluntariness, the learned deputy public prosecutor submitted that there is no duty on the prosecution to establish voluntariness of the information in order for the information to be admitted under s 27 of the Evidence Act 1950. The voluntariness rule does not apply to s 27.

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[54] Learned counsel objected to the admissibility of the said information under s 27 of the Evidence Act 1950 on the following grounds:

(a) it was doubtful whether the information was recorded in the moving car as it was highly improbable for SP17 to have written ID49 so neatly while travelling in a car;

(b) whether the warning and contents were translated to the second accused as this not reflected in 1D49;

(c) according to the information given by the second accused, the burnt car was in Banting but according to SP3 the photographer, the burnt car was found near Taman Panglima Teluk Panglima Garang;

(d) there was no discovery but recovery as the police had prior knowledge of the whereabout of the car; and

(e) the second accused was not taken to the place where the burnt car was found.

[55] First and foremost, it should not be disputed that the law as it stands the issue of voluntariness is not applicable to s 27. Having considered the evidence adduced, I ruled that the information given by the second accused, that is, 'saya boleh tunjukkan tempat bakar itu kereta di Banting' should not be admitted for the following reasons:

(a) according to SP3, the place where the burnt vehicle was found was near Taman Panglima Teluk Panglima Garang or at 'tepi jalan besar Banting-Klang hadapan Taman Jaya Utama, Teluk Panglima Garang, Selangor' (see exh P48 – Borang Bongkar);

Whereas according to the information as contained in ID49 given by the second accused, the burnt car was in Banting. It can therefore, not be said that the burnt car was discovered in consequence the information given by the second accused.

(b) to be admissible under s 27, the thing recovered must have the characteristic feature of being hidden: *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401, (HC); *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120 and *Pulukuri Kottaya & Ors v Emperor* AIR 1947 PC 67, (PC).

I find that the burnt was not hidden when it was recovered by the police. In fact it was found beside a main road where any body who passes by could see it.

(c) the accused did not lead SP17 and his men to the place where the burnt car was found.

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[56] Based on the reason given, i find that the requirements of s 27 had not been strictly complied with by the prosecution and therefore reject the prosecution's application in admitting such information.

[57] Apart from the rasons given I find that it is doubtful whether the information was given by the second accused to SP17 in a moving car as it is difficult if not impossible for one to record the information so neatly as reflected in ID49.

The recovery of four *parang*, a DVD player one T-shirt and a pair of jeans (trousers) and the 12 broken pieces of a car No Plate AFR 2356.

[58] After the arrest of the third accused, he had led SP17 and his men to the discovery/recovery of the four *parang*, one DVD player, one T-shirt and one pair of jeans (trousers) from a house at LMS 248, Jalan Ladang Teluk Datok Banting, Kuala Langat and had subsequently led SP26 to the recovery/discovery of 12 broken pieces of a car registration No Plate AFR 2356 by the side of Jalan Besar Jalan Bagan Kebun Bharu Batu 9 Teluk Panglima Garang.

[59] Of all the exhibits recovered there are only two exhibits which could link the third accused to the crime of murder, that is, the LG DVD player exh P17 and the broken pieces of number plate (P88, P89 (A–D), P90, P91 and P92 (A&B)).

[60] It has been proven by the prosecution that the LG DVD player recovered by the police belonged to the deceased. Whereas the 12 broken pieces of No Plate AFR 2356 was similar to the registration number of the Proton waja owned by SP7 the deceased's daughter.

[61] Again the prosecution was seeking to admit the information given separately by the third accused to SP17 and SP26 which had resulted in the discovery of the aforesaid two exhibits under s 27 of the Evidence Act 1950.

Issue No 1

[62] Whether the information contained in ID50 which led to the discovery of tha DVD player was admissible under s 27 of the Evidence Act 1950?

[63] The prosecution had adduced evidence that after arresting the third accused on 17 January 2009 at about 2.30pm in front of the 7 Eleven shop in Teluk Panglima Garang SP17 brought him back to Balai Polis Panglima Garang where he lodged a police report.

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[64] At the *Balai*, SP17 interrogated the third accused in the presence of one D Kpl Gunalan and two other police personnel. The accused said he wished to give information regarding the Kg Bharu Repot 88/09. Before the third accused gave information to SP17, SP17 administered the caution to him in Bahasa Melayu and was repeated by D Kpl Gunalan in Tamil. According to SP17 the third accused could speak and understand Bahasa Melayu. He understood the caution read by SP17 and D Kpl Gunalan.

[65] SP17 then recorded the information in his note book. The page from the note book which contained the information was produced and marked as ID50.

[66] As a result of the information given, SP17 and his men, being led by the third accused went to his house in Teluk Panglima Garang. SP17 and his police party reached the house at about 3–3.30am. The third accused pointed four *parang* which were thrusted (*terpacak*) at separate positions on the fencing at the back portion of the house. Then the third accused brought SP17 inside the house and pointed to one DVD player on top of a TV rack. SP17 then seized the four *parang* together with the DVD player, a T-shirt and a pair of jeans (pants) found inside the house:

[67] The prosecution informed the court that it only intended to apply to admit the underscored portion in ID50, that is, 'saya boleh tunjuk tempat saya simpan empat parang, DVD player dan pakaian dan semuanya ada dirumah saya'.

[68] The prosecution submitted that the requirements of s 27 had been complied with. Whereas learned counsel for the third accused strongly objected to the admissibility of such information mainly on the ground that all the exhibits recovered were not hidden but were in open places as can be seen in photographs marked P9 (1–19) where the police could easily find them even without having to rely on the information given by the third accused.

[69] The law requires that the thing recovered must have the characteristic feature of being hidden and since the exhibits in this case were not recovered from a place of concealment and were ordinarily visible to others meaning they could easily be seen by anyone coming the house. I therefore reject the application to admit the information contained in ID50 under s 27 of the Evidence Act 1950.

Issue 2

[70] Whether the information given by the third accused, that is:

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(1) 'saya boleh tunjuk tempat saya buang nombor plet' contained in Pekan Baru Repot 421/09 – ID87.

(2) (2) 'OKT3 telah menunjukkan kepada saya satu kawasan di tepi jalan yang mengandungi parit kecil sepanjang jalan tersebut dengan dikelilingi oleh Kebun Kelapa Sawit' which had led to the discovery of the 12 broken pieces of number plate AFR 2356 were admissible under section 27 of the Evidence Act 1950.

The facts pertaining to the discovery of the 12 broken pieces of No Plate AFR 2356

[71] SP26 ASP Somu a/l Subramaniam told the court that he together with three other police personnel had interrogated the third accused who was in police custody. During the interrogation, the third accused had told SP26 something. On the same day at about 3.30pm, SP26 being led by the third accused had come to the side of a main road that is Jalan Bagan Kebun Bharu Batu 9 near Taman Bentara in Teluk Panglima Garang.

[72] On arrival at the place led by the third accused, the third accused then pointed to a place beside the road which had a small drain alongside the road which is surrounded by oil palm plantation. SP26 and his men then searched the place for 45 minutes and found 12 pieces of broken number plates of AFR 2356 in three places namely by the side of the road, the small drain and in the drain.

[73] SP26 told the court that the information given by the third accused during the interrogation was 'saya boleh tunjuk tempat saya buang nombor plet'. He had subsequently lodged a police report, that is, Pekan Baru Repot 421/09 pertaining to the information given by the third accused. The Pekan Baru Repot 421/09 was tendered and marked as ID87.

[74] The prosecution was making an application to admit:

(a) the information as contained in ID87; and

(b) the act of pointing by the third accused to an open place where 12 pieces of broken number plate were found.

[75] Learned counsel for the third accused objected to the admissibility of such information on the following grounds:

(a) the information given by the third accused as contained in ID87 did not indicate any location of the object;

(b) the registration number of the number plate was not stated in the report ID87; and

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(c) SP26 agreed with learned counsel that the broken pieces of number plate as shown in photograph P10(1) could be easily found by the police if the police were to park their vehicle in the position as shown in photograph marked P10(7).

[76] Having applied the principles of law relating to the admissibility of information under s 27 of the Evidence Act 1950 to the facts relating to the discovering of the broken pieces of number plate in this case, I rule that the aforesaid information is not admissible for the main reason that the object recovered lacked the characteristic feature of being hidden. It is not disputed that 12 pieces of broken number plates were found in three places namely, beside the road, beside a small drain and inside the drain in an open place. I am aware of the principles laid down regarding the admissibility of information for objects recovered in open places or places accessible to others. The crucial question is not whether the place where the objects were recovered was accessible to others or not but whether it was ordinarily visible to others.

[77] SP17 during the cross-examinations had agreed with learned counsel for the first accused that the broken pieces of number plate shown in photograph P10(1) could be easily found by the police. Likewise, if we were to look at the other photographs P10(1–5) where the other broken pieces of number plate were found, the fact remains that they were not hidden but were visible and such broken pieces of number could be found with any diligent search conducted by the police as in this case, SP26 and his men took 45 minutes to locate all the broken pieces of number plate.

FINDINGS

[78] With the rejection of all the information leading to discovery sought to be admitted by the prosecution, the evidence of the recovery of the incriminating objects namely, the LG DVD player, the Waja frame and the broken pieces of number plate is still admissible. Obviously, such evidence, by itself is not sufficient to prove that the second and the third accused had broken into tho deceased's house and had slashed the deceased.

[79] The prosecution submitted at the end of the prosecution case that the conduct of the second and the third accused leading the police party and pointing out the place where the incriminating articles were found would be admissible as conduct under s 8 of the Evidence Act 1950 eventhough such information leading to discovery had been ruled inadmissible by the court.

[80] I am in fact of the view that the conduct of leading the police party to where the incriminating exhs were recovered and the act of pointing by the second and third accused should be admitted under s 8 of the Evidence Act

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1950. However, the admission of such evidence only goes to prove that they knew the existence of such incriminating articles. This is only a piece of circumstantial evidence which by itself is still not sufficient to prove that it was the second and third accused who had slashed the deceased on the day and time in question.

[81] Having considered the evidence in totality at the close of the prosecution case, I find that there is no prima facie evidence to prove that it was the three accused persons who had caused the death of the deceased.

[82] For the above reasons, I find that the prosecution had failed to establish a prima facie case for the murder charge against all the accused and I therefore acquit and discharge all of them without calling upon them to enter their defence.

On appeal to Court of Appeal against the order of acquittal at the end of prosecution case

[83] The prosecution being dissatisfied with my decision appealed to the Court of Appeal. The Court of Appeal after perusing my grounds of judgment and the notes of evidence and after hearing the submissions from the prosecution and the defence, allowed the appeal and found that the prosecution had established a prima facie case against all the three accused persons at the end of the prosecution case and ordered the three accused persons to enter their defence. The Court of Appeal did not furnish any grounds of judgment.

[84] Without the benefit of reading the grounds of judgment of the Court of Appeal, i am of the considered view that the Court of Appeal in ordering the three accused persons to enter their defence has stood in the shoes of the trial judge and found that there was sufficient reliable circumstantial evidence adduced by the prosecution which led to the irresistible conclusion that all the three accused persons in furtherance of the common intention had committed the offence of murder. The irresistible conclusion test is synonymous with the standard of proof of beyond reasonable doubt: *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306.

The defence

[85] I ordered all the three accused persons to enter their defence. Three alternatives had been explained. All the three accused persons chose to give their respective defence on oath.

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The defence of the first accused person

[86] The first accused told the court that between 11 January 2009 and 16 January 2009 he was in his friend's house in Bukit Beruntung, Rawang. On 16 January 2009 he was arrested by the police. He said he did not know why he was arrested.

[87] However, the first accused person said, the police after assaulting him, told him that he was arrested in connection with a murder case in Ipoh. He said he had read from the newspaper about the murder of a temple chairman of Buntung in Ipoh. He said he did not know Sithambaran and had never met him.

[88] He also told the court that sometime at the end of December 2008, he and a friend by the name of Rajah attended a prayer ceremony in Buntung temple. The said ceremony ended at about 8pm.

[89] After that Rajah asked for his help to send some boxes which contained some prayer items to the house of the temple chairman. He was helping Rajah to carry the boxes to the chairman's house. On arrival at the house, they entered from the back of the house. The first accused said, he opened and held the grill of the back door while Rajah was carrying the boxes into the back portion of the house. The first accused person said he did not see anybody in the house. Neither did he see the chairman of the temple.

[90] The first accused person told the court that since his arrest, he had been in remand for two years and had lost contact with Rajah.

The defence of the second accused person

[91] The second accused person told the court that he was arrested at the Petronas Petrol Kiosk at Batu Caves on 16 January 2009 at about 3pm and he was subsequently taken to IPD Gombak by the police.

[92] He said that the police did not question him during the journey from the place of his arrest to the IPD Gombak and it only took a short time to reach the Gombak Police Station.

[93] He was handcuffed at the back and he was beaten by the police and they pulled his T-shirt and covered his face until the nose.

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[94] At IPD Gombak, there were about ten policemen surrounding him and he was questioned as to the whereabout of the Proton Waja which he purportedly bought from Jegan whose real name is Jeganathan.

[95] The second accused person answered that he did not purchase the said car from Jegan and informed the police that Jegan told him that he had instructed his friend to bum the car in Banting. The police accused the second accused person of burning the car.

[96] At the IPD Gombak, the police officer prepared a statement and requested the second accused person to read it (exh ID49).

[97] The second accused person could not read it because he cannot read Bahasa Malaysia and the contents of ID49 was not read to second accused person neither was it translated to him in Tamil.

[98] He was instructed by the police officer to sign at the right side of exh ID49 and the second accused person followed the instruction.

[99] He was then taken to a place known as Telok Panglima Garang and on the way whilst he was in the police car, the police slowed down the car and the second accused person could see a burnt car on the road side but the police did not stop the car.

[100] Subsequently, whilst at Telok Panglima Garang at the 7 Eleven shop, the police stopped the car and later another male Indian was arrested (ie third accused person). The second accused parson was kept in the custody of Balai Polis Telok Panglima Garang separated from the third accused person and in the early hours he was then taken to Balai Polis Klang for a short while and transferred into a van to Balai Polis Ipoh where he was remanded.

[101] The second accused person told the court that prior to his arrest, on 13 January 2009, a person who was a runner to the second accused person known as Jegan met up with him and Jegan said he had got a Proton Waja for scrap because of non-payment of the finance and asked the second accused person whether he wanted the car and requested for RM2,000 for the scrap.

[102] The second accused person's business is recycling and deals with the scrap metal and he has a registered business in the name of Saravanan Metal Recycling Enterprise.

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[103] The second accused person agreed to the request of Jegan provided the car owner produced the registration card of the said vehicle to which Jegan said he would get the registratrion card and call him after getting the card.

[104] On 14 January 2009 at about 10.30am, Jegan called the second accused person to meet him at a Mamak Restaurant at Semenyih, Selangor to show the car. On 14 January 2009 in the morning, the second accused person went to meet Jegan at the Mamak restaurant. On arrival he saw a Proton Waja, dark purple in colour at the parking place. The second accused person told Jegan he would not take the car without the registration card. Jegan told him that he would contact him when he obtained the registration card from the owner of the car.

[105] On 15 January 2009 at about 2pm the second accused person phoned Jegan as his customers needed some spare parts, Jegan told him that the owner wanted to claim insurance, and he had surrendered the car to a friend to be burnt in Banting.

[106] The second accused person also confirmed that on 11 January 2009 at about 11.30pm until 2.10am on 12 January 2009, he was sleeping at his residence in Bandar Kajang Technology, Kajang, Seiangor Darul Ehsan and did not at all go to Ipoh.

The defence of third accused person

[107] The third accused person told the court that he was then working as a security guard.

[108] On 17 January 2009 at about 2.30am he went to a 7 Elevan shop in Telok Panglima Garang to buy cigarette on his motorcycle. A car came and blocked him. Two persons came out from the car and pulled him from his motorcycle and he felled. They covered his face with his jacket and handcuffed him from the back. He said he subsequently knew that they were the police. The third accused person said more than two police personnel had arrived. They kicked him and hit his head and cheek with the butt of a pistol. One of them said he would release his handcuff, let him run and he would shoot him. His nose was bleeding as a result of the assault. He also said one Indian police personnel had used abusive language against him. He was then brought to Telok Panglima Garang Police Station in a police car.

[109] The second accused person was brought to a room at the police station where the police removed the jacket. The third accused person then saw eight or nine police personnel around him. They accused him that he had committed a murder. When he denied, one Malay police office kicked him and knocked

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his head against the wall. He said his nose was bleeding, his lips were injured and he almost fainted as a result of the assault.

[110] While in the interrogation room, the police brought in a person by the name of Maaveeran who was also handcuffed. Maaveeran then told the third accused person that he had told the police that the DVD player he gave to the third accused person was then in the third accused person's house.

[111] He was subsequently blindfolded and brought into a police car to his mother-in-law's house. On arrival, two police personnel stood guard on him in front of the house while four police personnel proceeded to the back portion of the house. About 15 to 20 minutes later the four police personnel returned with four *parang* and showed them to him.

[112] The two police personnel who stood guard on him then brought him into the house where he saw, his wife, two children, mother-in-law, brother-in-law and four other relatives. Then came three police personnel and they conducted a search and found a DVD player. They showed it to the third accused person. The third accused person said the DVD player was given to him by Maaveeran three days before his arrest and Maaveeran asked him to keep it for him and promised to take it back in two weeks' time. Maaveeran did not tell him from where he took the DVD player. The third accused person said he had known Maaveeran for about one year. He was staying in Taman Sentosa, Kelang. Maaveeran knew how to go to his mother-in-law's house.

[113] The third accused person also told the court that the four *parang* belonged to his brother-in-law and they were used by his brother-in-law to hunt for the monitor lizards. The third accused person said he never gave the information as alleged by the police in ID50, namely, 'saya boleh tunjuk tempat saya simpan empat parang, DVD player dan pakaian yang saya pakai semasa samun di Ipoh dan semuanya ada di rumah saya'. He also denied that he led the police party to the discovery of four parangs and the DVD player on 17 January 2009. Neither did he point to the four *parang* which were outside the house or the DVD player which was inside the house to the police.

[114] From the mother-in-law's house he was taken to the Ipoh Police Station where he was assaulted. One police personnel by the name of Murali who had put cigarette ashes and *cili padi* into his mouth. He was given electric shock. The police continued to assault him with rubber pipe and forced him to admit the murder.

[115] The third accused person further denied that he had given any information as contained in ID87 to Inspector Somu that is, 'Saya boleh tunjuk tempat saya buang nombor plet'. Neither did he lead the police party to

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the place where the number plate was discovered on 25 January 2009. When he was brought to the said place, his eye was blindfolded. He did not know what was found by the police at the said place.

[116] He also told the court that between 11 January 2009, 11.30pm and 12 January 2009, 2.10am, he was sleeping in his mother-in-law's house. He also said that from 11 January 2009 to 12 January 2009 he did not go to Ipoh.

Evaluation of the defence put forward by the three accused persons at the end of the trial

[117] In considering the defence put forward by all the three accused persons, I have to bear in mind that the Court of Appeal which had stood in the shoes of the trial judge found that the prosecution had established a prima facie case against all the accused persons based on the evidence adduced at the end of the prosecution case. In other words, the evidence adduced by the prosecution has satisfied the maximum evaluation test.

[118] My duty at the end of the defence is to consider whether the defence put forward, whether believable or unbelievable has created a reasonable doubt in the prosecution case.

The defence of alibi

[119] I find that the common defence put forward by all the three accused persons was that they were not present at the scene of crime on the day and time in question. They said they were elsewhere.

[120] In the first place, I find that such a defence cannot be considered as an alibi defence under s 402A of the Criminal Procedure Code, as they failed to give a ten days' notice as required by the relevant provision.

[121] Secondly, I find that the alleged defence is just a bare denial which is not supported by any evidence in court. Having considered the bare denials vis-a-vis the evidence adduced in totality for this case, I find that it failed to create any reasonable doubt in the prosecution case.

New facts/evidence was introduced in the defence

[122] All the accused have introduced new facts in their respective defence as follows:

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(a) the first accused person was trying to explain why his fingerprint was left at the back grill door of the deceased's house when he delivered the boxes to the deceased's house with his friend Rajah;

(b) the second accused person had given a different version of his encounter with one runner by the name of Jeganathan who asked him whether he wanted to buy the Proton Waja as scrap for RM2,000. But Jeganathan subsequently told him that since the owner wanted to claim insurance and Jeganathan had instructed his friend to burn the car in Banting; and

(c) the third accused person said it was Maaveeran who asked him to keep the said DVD and promised to claim it from him in two weeks' time.

[123] Having considered the new facts raised in the first time in the defence, I find that these new defences are afterthoughts as they were never put or suggested to the prosecution witnesses at the prosecution stage.

[124] To support my finding, I would cite the principles laid down in the following cases:

(a) In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC) Raja Azlan Shah as he then was had this to say:

> A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the Appellant's trouser pockets remains unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony;

(b) In *Public Prosecutor v Lin Lian Chan* [1992] 2 MLJ 561 (SC)when the then Supreme Court held:

> The trial judge appreciated correct law when he held, as he did in fact hold, that the defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible state. Indeed, it behoves the defence to do so, for me need hardly say that if a defence is sprung in Court for the first time when the accused makes his defence from the witness box or the docks so that the prosecution is taken by surprise the accused runs the risk of being criticized for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention.

[125] In the light of the above authorities I find that the defences are afterthoughts as they were sprung up for the first time during the defence stage and I also find that they are bare assertions without being substantiated with evidence and have failed to create any reasonable doubt in the prosecution case.

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The allegation of assault before giving information leading to discovery of the relevant exhibits

[126] As regards the allegations of assault pertaining to the voluntariness of the information given by the second and the third accused persons who led the police party to the discovery of the burnt Proton Waja, the DVD player and the car number plate, i am of the considered view that it is settled law that the issue of voluntariness of information given is not relevant to an application made under s 27 of the Evidence Act 1950. I also find that such allegations of assault have also failed to cast any reasonable doubt in the prosecution case.

Others denials raised during the defence

[127] The defence has raised a series of denials and among others are as follows:

(a) the accused persons denied knowing each other before the alleged murder;

(b) they denied knowing the deceased before the incident;

(c) the second accused person admitted having signed ID49 but said that he did not understand the contents of ID49 as it was not read and interpreted to him;

(d) the third accused person denied having any information as contained in ID50 and ID87; and

(e) the second and third accused persons also denied having brought the police party to the discovery of the exhibits.

[128] Having carefully considered the aforesaid series of denials put forward by the accused persons, I find that the said series of denials are just bare assertions without being substantiated with evidence and they have also failed to cast a reasonable doubt in the prosecution case.

DECISION

[129] For the above reasons, I find that the defence put forward by the three accused persons have failed to create any reasonable doubt in the prosecution case and the prosecution had succeeded in proving its case as per charge in exh P2 against all the three accused persons beyond reasonable doubt at the end of the defence case.

[130] I therefore find all the accused persons guilty and convicted as per charge and sentenced each accused person to death, to wit to be hanged by the neck till death.

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Accused persons convicted and sentenced to death.

Reported by Afiq Mohamad Noor